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In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES CLIFTON HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 652

JAMES CLIFTON HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B. 11-13; R. 3-7) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1957 (Pet. App. B. 10-11; R. 8). The petition for a writ of certiorari was filed on December 9, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to permit petitioner's wife to testify as a government witness.

2. Whether, if there was error in this respect, it was prejudicial.

RULE INVOLVED

Rule 26, F. R. Crim. P., provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Northern District of Oklahoma of knowingly transporting Lola Fay Moudy on or about November 23, 1955 from Mena, Arkansas, to Tulsa, Oklahoma, in violation of the Mann Act (18 U.S.C. 2421) (Tr. 3).[1] He was sentenced to a term of imprisonment of 5 years (Tr. 4).

The evidence in support of the verdict may be summarized as follows:—

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[1] The designation "Tr." refers to the stenographic transcript of the trial proceedings.

The principal government witness was the girl alleged to have been transported, eighteen-year-old Lola Fay Moudy. She testified that she had worked in a beer tavern in Dogpatch, Oklahoma, near petitioner's dance hall (Tr. 7-8). In November 1955 she told petitioner that she wanted a better job and he asked her if she wanted to go up to Tulsa and work with a Jane Wilson (Tr. 8). She understood that this meant to work as a prostitute (Tr. 9). Subsequently, petitioner drove her in a Cadillac with leopard skin upholstery from Dogpatch, Oklahoma, through Mena, Arkansas, where a headlight was repaired, to Tulsa, Oklahoma (Tr. 11-12). After a phone call at a Tulsa gas station, Jane Wilson and another girl named Tommie got Lola from petitioner's car and took her to Jane's hotel room (Tr. 12-13). Jane gave Lola advice on her work. The following day, Lola registered at another hotel (Tr. 13). She stayed for a few days and engaged in prostitution. After being arrested, she went to another hotel where she continued to engage in prostitution. Within a day or two, she went with Jane and Tommie to Fort Smith, Arkansas, where she met petitioner. She left with him for Hot Springs "to work." However, she did not work there and left for home alone shortly thereafter (Tr. 14-19).

The testimony of the complaining witness was corroborated by her father who testified that in November 1955 he saw his daughter leave in a large light-colored car (Tr. 32-33). Tommie Alexander testified that she and Jane Wilson picked up the complaining

witness (known as Johnnie) at a gas station in Tulsa from a light-colored Cadillac driven by a man (not otherwise identified) (Tr. 25-27). Tommie also testified that she and Jane drove with the complaining witness from Tulsa to Fort Smith in the early part of December 1955 (Tr. 27-28). A clerk in the Corona Hotel in Tulsa testified that he saw Jane Wilson and Tommie Alexander leave the hotel together early one morning of November 1955 and come back with a third girl, Johnnie, who visited with the other girls for a few hours. He testified that he knew Jane and Tommie to be prostitutes (Tr. 29-31). An employee of a gas station in Mena, Arkansas, testified that in November 1955 he repaired a headlight on an orange Cadillac with leopard skin upholstery (Tr. 33-34).

Petitioner's wife testified for the government over petitioner's objection. She said she was separated from petitioner; that during November 1955 she used the name Jane Wilson and engaged in prostitution (Tr. 35-37). On cross-examination she testified that she was not living with petitioner in November 1955; that during the time she lived with him she did not engage in prostitution; and that he did not know she was engaged in prostitution (Tr. 37).

Petitioner took the stand, admitted that he had transported Lola Fay Moudy to Tulsa so that she might get a job, but said that he did not find out until later that his wife was engaged in prostitution (Tr. 41). Under cross-examination, petitioner said that he had received money from his wife during No-

vember 1955 (Tr. 44). His wife was then recalled to the stand as a defense witness to confirm his statement that this money was sent to repay a sum which she had taken from the cash register when she left (Tr. 48).

The Court of Appeals affirmed the judgment of conviction on the separate grounds, (1) that petitioner's wife was competent to testify against her husband, and (2) that even if she were not, the admission of her testimony was harmless error (Pet. App. B. 11-13).

ARGUMENT

1. There is a conflict of circuits as to whether a wife, who is not the injured party, is competent to testify *against* her husband. The views of the Tenth Circuit in the instant case that she is competent were foreshadowed in *Yoder* v. *United States*, 80 F. 2d 665, where, however, the woman was in fact divorced at the time of trial. The Second Circuit in *United States* v. *Walker*, 176 F. 2d 564, held that a separated wife is incompetent to testify against her husband since there is always the possibility of reconciliation. See also as barring the testimony of a husband separated from his wife, *Paul* v. *United States*, 79 F. 2d 561 (C.A. 3), and generally to the effect that a wife cannot testify against her husband, *Brunner* v. *United States*, 168 F. 2d 281 (C.A. 6). The government's petition for a writ of certiorari to the Second Circuit in the *Walker* case was denied. 338 U.S. 891.

The government, believing that this conflict should be resolved, would not oppose the request that certiorari be granted in this case were it not for the independent ground on which the decision below rests, *i.e.* that even if there was error, it was, in the circumstances of this case, harmless. This conclusion of the Court of Appeals appears to us correct on this record, and we would urge affirmance on that ground if certiorari were to be granted. We do not believe that in these circumstances we would be justified in again asking the Court to consider the more general question of the competency of the wife to testify against her husband.

2. The testimony of petitioner's wife as a government witness on direct examination was limited to the facts that in November 1955 she used the name Jane Wilson and engaged in prostitution. It is this testimony to which petitioner objects (Pet. 6). But both of these facts had already been established independently of the wife's testimony.

The fact that Jane Wilson was a prostitute was brought out by the uncontradicted testimony of Lola Fay Moudy[2] and the hotel clerk.[3] The fact that Jane Wilson was the wife of the petitioner had been repeatedly referred to by petitioner's counsel himself

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[2] "Well, she [Jane Wilson] was just telling me how to act when I went into a room, how much to charge for dates, what kind of dates they was." (Tr. 13)

[3] "Q. Now this Jane Wilson and Tommie Alexander, do you know them to be prostitutes?
"A. Yes, sir." (Tr. 29)

in cross-examination of the complaining witness.[4] In the light of this record, we believe that any error in allowing the wife to testify was harmless.

It should be noted that the wife's testimony was favorable to the petitioner on cross-examination, where she testified that petitioner did not know she was engaged in prostitution (Tr. 37), and that petitioner later recalled his wife as a defense witness where she again testified in his support. Under all these circumstances, we conclude that this case does not raise the broad question as to whether a wife who is not the injured party is a competent witness against her husband.

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[4] "Q. Did you know who Jane was?
"A. Well, no, not exactly.
"Q. You do now, don't you?
"A. Yes, I do.
"Q. *She was his wife, separated from him, isn't that right;* did you know about that?
"A. I don't know anything about their personal life at all." (Tr. 21)

* * * *

"Q. After you got back to Fort Smith and you wanted to go down to Hot Springs, I believe, do you know whether or not you had a conversation with Mr. Hawkins there about *his wife hustling up here in Tulsa?*
"A. No." (Tr. 22)

* * * *

"Q. Didn't this occur: Didn't he tell you he was on his way to Oklahoma City, and was bringing you by Tulsa *to get a job with his wife?*
"A. No, he didn't. It didn't occur to me that he was going to Oklahoma City, but he was bringing me up here.
"Q. *For his wife to get you a job?*
"A. Yes.
"Q. She got you one, didn't she?
"A. Yes." (Tr. 23) (emphasis added throughout)

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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